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APPENDIX

Supreme Court of the United States

October Term, 1969

No. 85

ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., and DATA SYSTEMS, INC.,

Petitioners,

vs.

WILLIAM B. CAMP, Comptroller of the Currency of the United States, and AMERICAN NATIONAL BANK AND TRUST COMPANY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit

Petition for Certiorari filed April 10, 1969.
Certiorari granted June 23, 1969.

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DOCKET ENTRIES

Date	Proceedings
6-15-67	Filed Complaint. Issued Summons.
7- 5	Filed Summons returned served June 16, 20 and 22 - 1967.
8-15	Filed Answer, with certificate of service by mail on 8-14-67. (Deft. Camp only.)
8-17	Filed Answer of defendant American National Bank and Trust Company, with aff. of service by mail on 8-16-67.
9-25	Filed motion of defendant American National Bank and Trust Company for dismissal of this action, with aff. of service by mail on 9-22-67. Not noticed for hearing at any given time.
9-26	Filed notice of motion returnable 10-10-67 at St. Paul, on motion of the defendant, William B. Camp, etc., for dismissal of this action; memorandum in support thereof, and cert. of service by mail on 9-25-67, are attached.
10- 4	Filed notice of motion returnable at St. Paul, Oct. 10, 1967, on motion of The American Bankers Association for leave to appear and file a brief amicus curiae. Three affidavits of service, personal, on 9-29-67, are attached.
10- 6	Filed reporter's transcript of prooceedings had 9-25-67. (Sutfin, reporter)
10- 9	Filed plaintiffs' memorandum in opposition to defendants' motion to dismiss.
10-10	Filed appearance of Matthew Hale, General Counsel for The American Bankers Association, 815 Conn. Ave. N.W., Washington, D.C.

Entered record of hearing on the following motions:

(a) Mo. by American Bankers Assn. for leave to appear and file brief in amicus curiae —granted without opposition to any of the parties.

(b) Mo. by Wm. B. Camp, etc., for dismissal —argued, taken under advisement.

(c) Mo. by American Nat. Bk. & Trust Co. for dismissal—argued, taken under advisement.

Mr. Kelley to submit reply to plaintiff's brief in two weeks.

Entered order admitting C. Westbrook Murphy to practice for the purpose of this trial, on motion of Stanley H. Green, Asst. U. S. Attorney.

Entered order admitting Matthew Hale to practice for the purpose of this action, on motion of Mr. Fallon Kelly.

10-19 Filed Reporter's Transcript of Proceedings of 10-10-67. (Sutfin, reporter)

1- 9-68 Filed and entered Order granting defendants' motions for dismissal of plaintiffs' Complaint and for entry of judgment. Memorandum attached thereto. (Neville - J.)

Filed and entered judgment of dismissal.

Mailed notice to counsel.

1-16 Filed reporter's certified notes of motion heard 10-10-67. (Sutfin - Rptr.)

1-17-68 Filed plaintiffs' notice of appeal from the order of dismissal entered herein Jan. 9, 1968.

Filed Bond on Appeal.

Mailed copy of notice of appeal to Patrick J. Foley, U. S. Attorney, 596 U. S. Courthouse, 110

S. 4th St., Minneapolis, Minn., to Carl Eardley, Acting Asst. Attorney General, Department of Justice, Washington, D. C., to Richard S. Beatty, Associate Chief Counsel, Office of the Comptroller of the Currency, Washington, D. C., to Kelly, Segell and Fallon, 500 Minnesota Bldg., St. Paul, Minn., and to Matthew Hale, The American Bankers Association, 815 Connecticut Ave. N. W., Washington, D. C.

1-25 Filed Appellants' Designation of Record on Appeal with aff. of service by mail 1-24-68.

16 Mailed c/copy of docket entries and Notice of Appeal to Robert C. Tucker, Clerk, U. S. Court of Appeals, St. Louis, Mo. 63101 (air mail).

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-67-165

ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., and DATA SYSTEMS, INC.,

Plaintiffs,

vs.

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, and AMERICAN NATIONAL BANK AND TRUST COMPANY,

Defendants.

COMPLAINT

1. Plaintiff Association of Data Processing Service Organizations, Inc. (hereinafter referred to as "ADAPSO"), is an incorporated association of data processing service organizations whose members are engaged in the business of performing data processing services for the business community throughout the United States. ADAPSO is incorporated under the laws of the State of Pennsylvania and has its principal place of business in Abington, Pennsylvania.

2. Plaintiff Data Systems, Inc. (hereinafter referred to as "DATA SYSTEMS"), is a business corporation duly incorporated under and doing business pursuant to the laws of the State of Minnesota, is a member of ADAPSO, has its principal place of business in Minneapolis, Minnesota, and is engaged in the business of marketing and performing data processing services for the general business community.

3. Defendant William B. Camp (hereinafter referred to as the "COMPTROLLER"), is the Comptroller of the Currency of the United States, and is a duly constituted officer of the Executive Branch of the Government of the United States, maintaining his official residence in the District of Columbia. His office is an "agency" of said Government within the meaning of Title 5 of the United States Code.

4. Defendant American National Bank and Trust Company (hereinafter referred to as "AMERICAN BANK"), is a national banking association organized and established pursuant to the National Banking Act (Chapter 2, Title 12, United States Code), and has its principal place of business at St. Paul, Minnesota.

5. This action arises under the National Banking Act (United States Code, Title 12, Chapter 2) and involves an interpretation and application of said Act, and a determination of the powers granted national banking associations under that Act as set forth in 12 U.S. Code §24.

6. This action is a proceeding for declaratory judgment and for an injunction pursuant to 28 U.S. Code Sections 2201 and 2202, and for damages. This court has jurisdiction of the controversy which is the subject matter of this action pursuant to 28 U.S. Code Sections 1331(a) and 1391(3) and 12 U.S. Code Section 94. The amount in controversy exceeds the sum of $10,000.00, exclusive of interest and costs. Action against the COMPTROLLER is also brought under Section 10 of the Administrative Procedure Act, 5 U.S. Code Section 701 ff. (1966) (formerly 5 U.S. Code Section 1009), the Declaratory Judgments Act, 28 U.S. Code Sections 2201 and 2202, and Sections 1331 and 1361 of the Judicial Code, Title 28 U.S. Code, to set aside the COMPTROLLER'S action in approving the marketing of data processing services by national banks as arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law, and to enjoin the

COMPTROLLER from issuing any purported ruling permitting such activities by AMERICAN BANK or any other national banking association.

7. The defendant COMPTROLLER has by ruling and other administrative action authorized defendant AMERICAN BANK and other national banks to perform the data processing services hereinafter described.

8. The defendants COMPTROLLER and AMERICAN BANK may exercise only those powers granted to them, respectively, by the National Banking Act and defendant COMPTROLLER cannot, pursuant to his administrative authority, lawfully issue rulings authorizing a national bank to act beyond its statutory powers.

9. Pursuant to 12 U.S. Code Section 24, a national bank has only such incidental powers as shall be necessary to carry on the business of banking. Although the use and ownership of data processing equipment by a national bank may be incidental to the carrying on of its banking business in furtherance of the express powers granted by Congress with respect thereto, the making of such equipment available to others or the performance of data processing services for its customers, is non-banking business, not within the statutory grant of powers, and unlawful.

10. The defendant COMPTROLLER'S authorization to national banks permitting them to engage in the marketing of data processing services is therefore in violation of the National Banking Act, beyond statutory authority, arbitrary, capricious, an abuse of discretion and not in accordance with law.

11. As a result of defendant COMPTROLLER'S action, the marketing of data processing services by national banks has been growing rapidly, and is anticipated to grow even more rapidly in the future. Because of the enormous financial power of national banks and their banking relationships

with existing and potential customers for such services, the marketing of such services by national banks threatens ultimately to exclude all ADAPSO members and other independent service organizations from all or a very substantial part of the market for the sale of data processing services.

12. Defendant AMERICAN BANK, since on or before February 20, 1967, has been and is presently offering to perform and is engaged in the business of performing data processing services for the general business community.

13. On or about February 20, 1967, the defendant AMERICAN BANK entered into an agreement with the State Capitol Credit Union of St. Paul, Minnesota, whereby AMERICAN BANK agreed to perform certain data processing services required by said Credit Union, and since that time AMERICAN BANK has performed or has prepared to perform such services for said Credit Union.

14. Prior to February 20, 1967, plaintiff DATA SYSTEMS had entered into negotiations with the aforesaid Credit Union to provide data processing services for said Credit Union. On or about December 19, 1966, DATA SYSTEMS agreed with said Credit Union to perform certain data processing services. Because of the actions of AMERICAN BANK as above set forth, DATA SYSTEMS has been deprived of the right and opportunity to perform said services and to be compensated therefor.

15. On or about April 15, 1967, AMERICAN BANK entered into an agreement with Carlen Industries, Inc., of Minneapolis, Minnesota, whereby AMERICAN BANK agreed to perform certain data processing services required by said company and since that time AMERICAN BANK has performed or has prepared to perform such services for said company.

16. Prior to April 15, 1967, DATA SYSTEMS had entered into negotiations with Carlen Industries, Inc., to pro-

vide data processing services for said company. Because of the actions of defendant AMERICAN BANK, as hereinbefore set forth, DATA SYSTEMS has been deprived of the right and opportunity to perform said services and to be compensated therefor.

17. The foregoing activities of defendant AMERICAN BANK in performing, and in holding itself out as willing to perform, data processing services for the above-mentioned companies and for the general business community are illegal, not part of or incidental to the business of banking and beyond the powers granted to national banks under the National Banking Act.

18. By performing said illegal data processing services, and by holding itself out as willing and able to perform such services, AMERICAN BANK has caused and unless enjoined will continue to cause substantial and irreparable harm to DATA SYSTEM'S business and to the business of other members of ADAPSO, by depriving them of customers for whom data processing services would be rendered and from whom compensation would be received.

19. Plaintiffs have suffered serious injury and damage and are continuing to suffer such injury and damage by the unlawful authorization of defendant COMPTROLLER and by the illegal activities of defendant AMERICAN BANK as aforesaid.

WHEREFORE, plaintiffs demand judgment as follows:

(a) Declaring that defendant COMPTROLLER'S ruling and other administrative action authorizing national banks to perform or make available data processing services for their customers is arbitrary, capricious, an abuse of discretion, in excess of statutory authority and illegal;

(b) Enjoining defendant COMPTROLLER from promulgating any rule or policy that national banks have the power to engage in the marketing or performance of data

processing service business for their customers or for the general business community;

(c) Enjoining defendant AMERICAN BANK from performing, or holding itself out as willing and able to perform, data processing services for its customers or for the general business community;

(d) Awarding to plaintiff DATA SYSTEMS and against defendant AMERICAN BANK, damages in the amount of not less than $100,000.00; and

(e) For such other relief as the Court may deem just and proper.

SHANEDLING, PHILLIPS, GROSS & AARON
By /s/ BERT M. GROSS and FELIX M. PHILLIPS
Attorneys for Plaintiffs
909 Farmers & Mechanics Bank Building
Minneapolis, Minnesota 55402

(Filed in the United States District Court, District of Minnesota, Third Division, on 6-15-67.)

ANSWER OF DEFENDANT AMERICAN NATIONAL BANK AND TRUST COMPANY

Defendant, American National Bank and Trust Company, for its answer to the complaint of the plaintiffs herein:

FIRST DEFENSE

I.

Admits all the allegations contained in Paragraphs 3, 4, 13 and 15 of the Complaint.

II.

Alleges that it does not have sufficient information to form a belief as to the truth of the allegations contained in Para-

graphs 1 and 2 of the Complaint and puts the plaintiffs to the strict proof thereof.

III.

Alleges that it does not have sufficient information to form a belief as to the truth of the allegations contained in Paragraphs 14 and 16 of the Complaint and therefore denies the same and puts the plaintiffs to the strict proof thereof.

IV.

Alleges that the allegations contained in Paragraph 7 of the Complaint are so indefinite, uncertain, and incomplete that it does not have sufficient information to form a belief as to the truth of said allegations and therefore denies the same and puts the plaintiffs to the strict proof thereof; further answering, this defendant specifically alleges that defendant Comptroller has from time to time issued rulings and promulgated administrative action relating to the authority of national banks, including this defendant, to conduct their business, and that all of the actions of defendant American National Bank and Trust Company have been and are compatible therewith.

V.

Admits that a national bank cannot act in a manner other than as authorized by federal law as alleged in substance in Paragraph 8 of the Complaint, but denies all other allegations contained in Paragraph 8 of the Complaint.

VI.

This defendant states that the allegations contained in Paragraph 9 of the Complaint are conclusions of law not requiring answer; however, to the extent that answers may be deemed to be required, defendant denies the allegations contained therein.

VII.

Except as hereinbefore admitted, qualified, or otherwise alleged, this defendant denies each and every allegation, matter

and thing in said Complaint contained and more specifically as contained in Paragraphs 5, 6, 10, 11, 12, 17, 18 and 19.

SECOND DEFENSE

Plaintiffs lack standing to bring this action.

THIRD DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

FOURTH DEFENSE

The Court lacks jurisdiction over the subject matter of this action.

WHEREFORE, defendant, American National Bank and Trust Company, prays that the plaintiffs' Complaint be dismissed, that it have its costs and disbursements herein, and that the Court grant such other and further relief as to it may seem just and proper.

/s/ FALLON KELLEY
/s/ HYAM SEGELL
Attorneys for Defendant American
National Bank and Trust Company
500 Minnesota Building
St. Paul, Minnesota 55101

Of Counsel:
KELLEY, SEGELL AND FALLON

(Filed in the United States District Court, District of Minnesota, Third Division, on 8-17-67.)

ANSWER

Defendant William B. Camp, Comptroller of the Currency of the United States, by his undersigned attorneys, in answer to the complaint herein, admits, denies and alleges as follows:

1. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of the complaint.

2. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2 of the complaint.

3. Defendant admits the allegations contained in Paragraph 3 of the complaint.

4. Defendant admits the allegations contained in Paragraph 4 of the complaint.

5. Defendant denies the allegations contained in Paragraph 5 of the complaint.

6. Defendant denies the allegations contained in Paragraph 6 of the complaint except that he admits that this is a proceeding for declaratory judgment, injunction and damages.

7. Defendant states that the allegations contained in Paragraph 7 of the complaint are too vague and imprecise to be answered and that he is therefore without knowledge or information sufficient to form a belief as to the truth thereof.

8. Defendant states that the allegations contained in Paragraph 8 of the complaint are conclusions of law not requiring answer; however, to the extent that answers may be deemed to be required defendant denies the allegations contained therein except that he admits that a national bank cannot act in a manner other than as authorized by federal law.

9. Defendant states that the allegations contained in Paragraph 9 of the complaint are conclusions of law not requiring answer; however, to the extent that answers may be deemed to be required defendant denies the allegations contained therein.

10. Defendant denies the allegations contained in Paragraph 10 of the complaint.

11. Defendant denies the allegations contained in Paragraph 11 of the complaint.

12. Defendant denies the allegations contained in Paragraph 12 of the complaint.

13. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 13 of the complaint.

14. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 14 of the complaint.

15. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 15 of the complaint.

16. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 16 of the complaint.

17. Defendant denies the allegations contained in Paragraph 17 of the complaint.

18. Defendant denies the allegations contained in Paragraph 18 of the complaint.

19. Defendant denies the allegations contained in Paragraph 19 of the complaint.

Defendant denies each and every allegation of the complaint not herein above admitted, qualified or denied.

SECOND DEFENSE

Plaintiffs lack standing to bring this action.

THIRD DEFENSE

The complaint fails to state a claim upon which relief can be granted.

FOURTH DEFENSE

The Court lacks jurisdiction over the subject matter of this action.

WHEREFORE, Defendant, the Comptroller of the Currency of the United States, having fully answered prays that the complaint be dismissed with costs and that the Court grant such other relief as to it may seem just and proper.

Respectfully submitted,

/s/ CARL EARDLEY
Acting Assistant Attorney General
By /s/ STANLEY H. GREEN
Assistant United States Attorney

PATRICK J. FOLEY
United States Attorney
/s/ HARLAND F. LEATHERS
/s/ C. WESTBROOK MURPHY
Attorneys
Department of Justice Attorneys for
Defendant William B. Camp
Comptroller of the Currency

Of Counsel:
/s/ RICHARD S. BEATTY
Associate Chief Counsel
/s/ RICHARD DOERSCH
Attorney
Office of the Comptroller of the Currency

(Filed in the United States District Court, District of Minnesota, Third Division, on 8-15-67.)

MOTION OF THE DEFENDANT, WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY, TO DISMISS THE ACTION

Defendant, William B. Camp, Comptroller of the Currency of the United States, by his undersigned attorneys moves the Court to dismiss this action upon the grounds that plaintiffs lack standing to maintain this action and that the Court lacks jurisdiction over the subject matter. In support of this motion the Court is respectfully referred to plaintiffs' complaint, and to the memorandum in support of this motion which is filed herewith.

Respectfully submitted,

CARL EARDLEY
Acting Assistant Attorney General
PATRICK J. FOLEY
United States Attorney
By: /s/ PATRICK J. FOLEY
Assistant United States Attorney
HARLAND F. LEATHERS
/s/ C. WESTBROOK MURPHY
Attorneys,
Department of Justice, Attorneys for
Defendant William B. Camp,
Comptroller of the Currency

Of Counsel:

/s/ RICHARD S. BEATTY
Associate Chief Counsel
/s/ RICHARD DOERSCH
Attorney
Office of the Comptroller of the Currency

NOTICE OF MOTION

To: Shanedling, Phillips, Gross & Aaron, 909 Farmers & Mechanics Bldg., Minneapolis, Minnesota 55402.

PLEASE TAKE NOTICE that William B. Camp, Comptroller of the Currency of the United States, and American National Bank and Trust Company, defendants above named, will bring the above motion on for hearing before this Court at the Federal Courthouse, St. Paul, Minnesota, on October 10, 1967, at 10:00 A.M. of that day, or as soon thereafter as counsel can be heard.

/s/ PATRICK J. FOLEY
United States Attorney
Attorney for Defendant
William B. Camp, Comptroller of the
Currency of the United States
596 U. S. Courthouse
Minneapolis, Minnesota 55401

(Filed in the United States District Court, District of Minnesota, Third Division, on 9-26-67.)

MOTION TO DISMISS

Defendant, American National Bank and Trust Company, by its attorneys, moves the Court to dismiss this action upon the grounds that the plaintiffs lack standing to maintain said action, and that the Court lacks jurisdiction over the subject matter. Said motion will be based upon all the files, records and proceedings herein and upon arguments to be adduced at a hearing thereon.

Dated: September 22, 1967.

FALLON KELLY
HYAM SEGELL
Attorneys for Defendant American
National Bank and Trust Company
500 Minnesota Building
St. Paul, Minnesota 55101

Of Counsel:
KELLY, SEGELL AND FALLON

(Filed in the United States District Court, District of Minnesota, Third Division, on 9-25-67.)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., and DATA SYSTEMS, INC.,

Plaintiffs,

vs.

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, and AMERICAN NATIONAL BANK AND TRUST COMPANY,

Defendants.

ORDER

The above-entitled matter came duly on for hearing before the undersigned, a judge of this court, at St. Paul, Minnesota on the 10th day of October, 1967 on the motions of both defendants for a dismissal of plaintiffs' complaint on the grounds of lack of standing in plaintiffs to maintain the present action. Patrick J. Foley, United States Attorney, by Stanley H. Green, Esq. and C. Westbrook Murphy, Esq. of the Department of Justice, Washington, D. C., appeared for defendant Comptroller William B. Camp; Kelly, Segell and Fallon by Fallon Kelly and Hyam Segell, Esqs. appeared for defendant American National Bank & Trust Company; and Matthew Hale, Esq., appeared amicus curiae for the American Bankers Association; all in support of said motions. Shanedling, Phillips, Gross & Aaron by Bert M. Gross and Felix M. Phillips, Esqs., appeared for plaintiffs in opposition thereto.

The court has examined the pleadings, heard the arguments of counsel and examined and read the various briefs

submitted, and on the basis thereof and on all the files, records and proceedings herein,

IT IS ORDERED that defendants' motions for dismissal of plaintiffs' complaint be, and the same hereby are granted and plaintiffs' complaint is hereby dismissed.

Let judgment be entered accordingly.

Dated: January 8, 1968.

/s/ PHILIP NEVILLE
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., and DATA SYSTEMS, INC.,
Plaintiffs,

vs.

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, and AMERICAN NATIONAL BANK AND TRUST COMPANY,
Defendants.

[OPINION]

Shanedling, Phillips, Gross & Aaron by Bert M. Gross and Felix M. Phillips, Esqs., appeared for plaintiffs.

Patrick J. Foley, United States Attorney, by Stanley H. Green, Esq., and C. Westbrook Murphy, Esq., of the Department of Justice, Washington, D. C., appeared for defendant Comptroller William B. Camp.

Kelly, Segell and Fallon by Fallon Kelly and Hyam Segell, Esqs., appeared for defendant American National Bank & Trust Company.

Matthew Hale, Esq., Washington, D. C., petitioned for leave to appear and file a brief amicus curiae on behalf of and as general counsel for The American Bankers Association, which petition the court granted.

NEVILLE, District Judge.

This matter comes before the court on motions by both defendants for an order of dismissal, grounded upon the alleged lack of standing in the plaintiffs to maintain the present action. Plaintiffs' complaint seeks a declaratory judgment, an injunction and compensatory damages, all on the theory that the marketing of data processing[1] to the public by defendant American National Bank is illegal and contrary to law. The complaint further avers that certain actions of the defendant Comptroller in approving the marketing of data processing services by national banks is "arbitrary, capricious, an abuse of discretion, in excess of statutory authority and illegal." The plaintiffs in essence seek a determination that the performing for a fee of data processing services by national banks for the public generally, or what were referred to on oral argument as "outsiders," is not within the scope of the powers and authority granted national banks under the National Bank Act as set forth in 12 U.S.C. §24. The pertinent provisions of this statute read as follows:

"§24. Corporate powers of associations.

Upon duly making and filing articles of association and an organization certificate a national banking asso-

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[1]As brought out in the oral arguments, data processing utilizes electronic devices, including what are commonly known as computers, to compile and calculate statistical information and is employed by businesses in the computation and preparation of payrolls, tax returns, monthly statements, bills and in other ways.

ciation shall become, as from the date of the execution of its organizaton certficate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

. . .

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, *all such incidental powers as shall be necessary to carry on the business of banking; . . .*" (Emphasis added.)

The allegation in the complaint as to the defendant Comptroller's administrative ruling is in general terms as follows:

"7. The defendant COMPTROLLER has by ruling and other administrative action authorized defendant AMERICAN BANK and other national banks to perform the data processing services hereinafter described." [2]

The plaintiff Association of Data Processing Service Organizations, Inc. ("ADAPSO"), is an incorporated association of data processing service organizations located throughout the United States whose members are engaged in the business of providing such type of service to the business community. Plaintiff Data Systems, Inc. is a Minnesota corporation with offices in Minneapolis, Minnesota, engaged in the business of marketing and performing data processing service for the general business community, and is a member of ADAPSO.

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[2]It appears from the brief submitted by the Comptroller that his position with respect to the furnishing of electronic data processing services by national banks was published as an interpretive ruling in the March 1964 supplement to the *Comptroller's Manual for National Banks*, paragraph 3500 of which reads as follows:

"A national bank may make available for the use of others processing equipment acquired for the primary purpose of performing service incidental to banking."

A later modification of this same paragraph, adhered to by the present Comptroller, appears in the *Comptroller's Manual* (October 15, 1966 ed.) in the following language:

"Incidental to its banking services, a national bank may make available its data processing equipment or perform data processing services on such equipment for other banks and bank customers."

The alleged injury to these plaintiffs resulting from the actions of the defendants is claimed to be solely an economic injury arising from what is contended to be illegal compe i-tion.[3]

The plaintiffs assert that they have standing to challenge the action of the Comptroller by virtue of Section 10 of the Administrative Procedure Act, 5 U.S.C. §701, et seq. The pertinent section of this Act, §702, provides that:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. . . ."

Since there are no specific provisions in the National Bank Act providing for a review of the Comptroller's rulings or conferring standing to maintain such actions as the instant case, it would appear that if the plaintiffs are to have what is called statutory standing at all, such must be grounded upon the above-quoted portion of the Administrative Procedure Act. The Eighth Circuit Court of Appeals, however, has adhered strongly to the view that the Administrative Procedure Act did not by its passage create any legal rights which did not otherwise exist and has cited numerous author-

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[3]Paragraph 11 of the complaint of plaintiffs charges:

> "As a result of defendant Comptroller's action, the marketing of data processing services by national banks has been growing rapidly, and is anticipated to grow even more rapidly in the future. Because of the enormous financial power of national banks and their banking relationships with existing and potential customers for such services, the marketing of such services by national banks threatens ultimately to exclude all ADAPSO members and other independent service organizations from all or a very substantial part of the market for the sale of data processing services."

The complaint goes on to allege that the plaintiff Data Systems had entered into negotiations in Minnesota with two particular potential customers to provide data processing service. It is stated that the defendant American National Bank and Trust Company subsequently made agreements with the same two potential customers for the performing of data processing service, thus depriving Data Systems of the right and opportunity to perform such service and to be compensated therefor.

ities in support thereof. *Rural Electrification Admin. v. Northern States Power Co.*, 373 F.2d 686, 692 (8th Cir. 1967). Quoted particularly in this case is *Dube v. Schuetzle*, 303 F.2d 570, 574 (8th Cir. 1962), to the effect that:

> "It has also been judicially determined that the Administrative Procedure Act was not designed to and in fact has not changed the basic principle that one must have suffered a *legal wrong* in order to have standing to challenge programs administered by governmental agencies. (Citing many cases.)"

The result is that in determining whether or not plaintiffs have standing this case must be considered without there being in existence any statutory right to judicial review. That is to say, the National Bank Act does not have within itself any provisions for court review, such for instance as the Internal Revenue Code or the Interstate Commerce Act, and it is clear that the Administrative Procedure Act does not and did not append such in effect to this Act so as to create a specific provision for judicial review.

There is a long and well established line of judicial authority holding that plaintiffs whose only injury is loss due to competition lack standing to maintain legal action to redress their economic injury. These decisions hold that mere competitive injury even though resulting from governmental action does not give standing to a person so injured to seek relief in the courts. *Alabama Power Co. v. Ickes*, 302 U.S. 464, 58 S.Ct. 300, 82 L.Ed. 374 (1938); *Tennessee Power Co. v. T.V.A.*, 306 U.S. 118, 59 S.Ct. 366, 83 L.Ed. 543 (1939); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108 (1940); *Kansas City Power & Light Company v. McKay*, 225 F.2d 924 (D.C. Cir. 1955), *cert. denied* 350 U.S. 884, 76 S.Ct. 137, 100 L.Ed. 780 (1955); *Texas State AFL-CIO v. Kennedy*, 330 F.2d 217 (D.C. Cir. 1964); *Benson v. Schofield*, 236 F.2d 719 (D.C. Cir. 1956), *cert. denied* 352 U.S. 976; *United Milk Producers of New Jersey v. Ben-*

son, 225 F.2d 527 (D.C. Cir. 1955); *Pennsylvania Railroad Co. v. Dillon,* 335 F.2d 292 (D.C. Cir. 1964); *Rural Electrification Admin. v. Central Louisiana Elec. Co.,* 354 F.2d 859 (5th Cir. 1966).

So in *Tennessee Power Co. v. T.V.A.,* 306 U.S. 118, 59 S.Ct. 366, 83 L.Ed. 543 (1939), the court laid down the rule that one threatened with injury by governmental action may not contest such in the courts "unless the right invaded is a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."

Plaintiffs in the case at bar have not lost nor had threatened any property interest (loss due to competition clearly not qualifying as such under the above cases); they do not allege any contract breach nor tortious action and it is clear as above set forth that neither the National Bank Act nor the Administrative Procedure Act are statutes confering any specific privilege on plaintiffs. Plaintiffs do not have any governmentally granted license or franchise which is impaired by defendants' actions.

No purpose will be served in this opinion by reviewing the detailed facts of the above cited cases. Their rationale seems to be this: The United States is a country dedicated to free enterprise. If A invests his money in a business, a grocery store for instance,[4] he cannot complain legally if another man

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[4]In *Alabama Power Co. v. Ickes,* 302 U.S. 464, 481 (1938), the court said:

"John Doe, let us suppose, is engaged in operating a grocery store, Richard Roe, desiring to open a rival and competing establishment, seeks a loan from a manufacturing concern which, under its charter, is without authority to make the loan. The loan, if made, will be *ultra vires.* The state or a stockholder of the corporation, perhaps a creditor in some circumstances, may, upon that ground, enjoin the loan. But may it be enjoined at the suit of John Doe, a stranger to the corporation, because the lawful use of the money will prove injurious to him and this result is foreseen and expected both by the lender and the borrower, Richard Roe? Certainly not, unless we are prepared to lay down the general rule that A, who will suffer damage from the lawful act of B, and who plainly will have no case against B, may nevertheless invoke judicial aid to restrain a

B opens next door to him and he, A, loses his investment because of the competition. Economic injury due to competition is not an actionable legal wrong. Even assuming that B did not file proper incorporation papers or income tax returns, or borrowed his money fom someone who lent it to him ultra vires, or agreed to pay usurious interest for borrowed money, or obtained his groceries illegally, still A as a competitor has suffered no judicially cognizable wrong.[5] The above reasoning applies where the competitor is the United States Government, i.e., in the public power field or more frequently where the government has enhanced competition by financial aid or grants to a competitor, even though the government may not have followed to the letter all of the requirements, or may have exceeded the restrictions and proscriptions of the Act of Congress creating or permitting its action.[6]

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third party, acting without authority, from furnishing means which will enable B to do what the law permits him to do. Such a rule would be opposed to sound reason, as we have already tried to show, and cannot be accepted."

5 "The appellants further argue that . . . they may, by suit, challenge the constitutionality of the statutory grant of power the exercise of which results in competition. This is but to say that if the commodity used by a competitor was not lawfully obtained by it the corporation with which it competes may render it liable in damages or enjoin it from further competition because of the illegal derivation of that which it sells. If the thesis were sound, appellants could enjoin a competing corporation or agency on the ground that its injurious competition is *ultra vires*, that there is a defect in the grant of powers to it, or that the *means of competition* were acquired by some violation of the Constitution. The contention is foreclosed by prior decisions that the damage consequent on competition, otherwise lawful, is in such circumstances *damnum absque injuria*, and will not support a cause of action or a right to sue." *Tennessee Power Co. v. T.V.A.*, 306 U.S. 118, 139-40 (1939).

6 ". . . When Congress has not given them any such standing by express or implied provision of statute • • •, mere economic competition made possible by governmental action (even if allegedly illegal) does not give standing to sue in the courts to restrain such action. . . . For purposes of standing in this case, the sufficiency of appellants' allegations of 'legal wrong' thus depend upon congressional intent to bestow upon them a legal right to protection from such competition." *Pennsylvania Railroad Co. v. Dillon*, 335 F.2d 292, 294-95 (D.C. Cir. 1964).

A further reason sometimes assigned for denying standing is that to allow such would permit some citizen or taxpayer who claimed a "public interest" or who desired to act as a "private attorney general" to challenge in court every action of the government.

Less than a year ago the Court of Appeals for the Eighth Circuit in a lengthy opinion adopted the rationale of the above cited cases. *Rural Electrification Admin. v. Northern States Power Co.*, 373 F.2d 686 (8th Cir. 1967), *cert denied* 387 U.S. 945 (1967), 87 S.Ct. 2079, 18 L.Ed.2d 1332. This decision binds this court and thus requires a dismissal of plaintiffs' complaint.

Of the several cases relied on by plaintiffs, most of them are distinguishable and not applicable to the case at bar. Several relate to situations where the federal or state governments have recognized that a particular field of competition is subject to regulation and restriction as to the number who may engage in such business, i.e., where for the benefit of the public, totally free and unrestrained competition in the banking field, for instance, is not desirable and should be confined. So, when a plaintiff already has a license or franchise to engage in such a field of business, the prospective entry of another into the same field has been held to give plaintiff standing to demand judicial review. Accordingly standing has been allowed to challenge the Comptroller's action in chartering a new national bank or a new branch of a national bank. *National Bank of Detroit v. Wayne Oakland Bank*, 252 F.2d 537 (6th Cir. 1958); *Hoosier State Bank of Indiana v. Saxon*, 248 F. Supp. 233 (N.D. Ind. 1965); *Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 323 F.2d 290 (D.C. Cir. 1963); *Webster Groves Trust Co. v. Saxon*, 370 F.2d 381 (8th Cir. 1966). In these cases an existing bank was the challenger in a field where, for the benefit of the public, the number who are allowed in competition is limited. A grocery store or data processing company failure or bank-

ruptcy would be unfortunate and cause the proprietors and owners to lose their investment, but a bank failure would cause not only loss of the owner's investment but also loss to many unwary members of the public who are depositors. For this reason competition is limited as to the number who can engage in this business. Thus in the interest of the public one already in this field has standing to challenge a proposed new entrant.

In accordance with this same general philosophy is *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470, 60 S.Ct. 693, 83 L.Ed. 869 (1940), allowing a competing radio station standing in the public interest to challenge an order granting a certificate to a new station.

The case of *Georgia Ass'n of Ind. Ins. Agents, Inc. v. Saxon*, 260 F. Supp. 802 (N.D. Ga. 1966), involved a section of the National Bank Act (12 U.S.C. §92) permitting the sale of insurance by national banks located in towns of 5,000 population or less. Insurance agents were allowed standing judicially to question the Comptroller's ruling granting certain authority to write insurance by national banks in cities of any size, on the grounds that this statute by clear implication was intended to protect a class, i.e., certain insurance agents and representatives. Thus standing existed in any member of this class. There is no such statute protecting data processors.

In this same category is *Investment Company Institute v. Camp*, 274 F. Supp. 624 (D.D.C. 1967), where a national bank instituted a collective investment fund. Plaintiff association sought to restrain the Comptroller from authorizing such. Plaintiff was held to have standing in view of the specific wording of the National Bank Act which by its language segregated generally national commercial banking from the securities business, thus creating a protected class. Cf., *National Ass'n of Securities Dealers, Inc. v. Securities Exchange Commission* (Case #20,164, D.C. Cir. decided No-

vember 21, 1967), denying standing involving the same bank in a somewhat differing controversy.

As to *Baker, Watts & Co. v. Saxon,* 261 F. Supp. 247 (D.D.C. 1966), it can only be said that it seems contrary in its philosophy and holding to the Eighth Circuit holding in *Rural Electrification Admin. v. Northern States Power Co.,* 373 F.2d 686 (8th Cir. 1967), *cert. denied* 387 U.S. 945 (1967), 87 S.Ct. 2079, 18 L.Ed.2d 1332. Perhaps the same can be said of some of plaintiffs' other cases. Even those distinguished hereinabove fundamentally adopt or lean toward the *Baker, Watts, supra,* approach and rationale. *Webster Groves Trust Co. v. Saxon,* 370 F.2d 381 (8th Cir. 1966), as an Eighth Circuit case, predates *Rural Electrification Admin. v. Northern States Power Co., supra,* by slightly more than a year and though it has language which would seem to support plaintiffs' contentions, it was distinguished by the court itself in the *Rural Electrification Admin. v. Northern States Power Co.* case and classified as illustrative of the type of case where an existing licensee in a regulated competitive field has standing where it offers to prove detriment to the public interest by the potential entrance of a new competitor.

Certain other cases are difficult to reconcile. As stated in *Rural Electrification Admin. v. Northern States Power Co.,* 373 F.2d 686, 692 (8th Cir. 1967):

> "Although concepts of standing, judicial reviewability and justiciable controversy are intermingled in the area of administrative review, our analyses compels reversal under any or all of these jurisdictional bases. Appellees' brief well demonstrates isolated statements and cases dealing with agency review are not all simply reconciled. . . ."

There is the view relied on by plaintiffs that actions of government officials ought to be rather freely judicially reviewable; that public officials ought to be subject to some rein by

the court.[7] Davis in his textbook on ADMINISTRATIVE LAW, Chapter 22, and specifically §22.18 takes particular issue with the federal cases denying standing and sets forth in the Chapter numerous reasons therefor.

Apart from all of the above, the rule in this Circuit seems clear from the teachings of *Rural Electrification Admin. v. Northern States Power Co., supra.* Such binds this court.

A separate order granting defendants' motions to dismiss plaintiffs' complaint has been entered.

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[7] In *Whitney Nat'l Bank v. Bank of New Orleans,* 379 U.S. 411, 427, 85 S.Ct. 551, 13 L.Ed.2d 286 (1965), the dissenting justice (quoted in *Webster Groves Trust Co. v. Saxon, supra*) stated:

> ". . . absent a congressional design to bar all judicial review . . . injunctive relief is available where administrative remedies are either inapplicable or inadequate. This rule keeps the Comptroller from being a free-wheeling agency dispensing federal favors; and it gives some assurance that he will render principled decisions within the rule of law laid down by Congress."

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

NOTICE OF APPEAL BY ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., AND DATA SYSTEMS, INC.

Notice is hereby given that Association of Data Processing Service Organizations, Inc., and Data Systems, Inc., herewith appeals to the United States Court of Appeals for the Eighth Circuit from the Order entered by Honorable Philip Neville, United States District Judge, in this action, on January 9, 1968, and the judgment entered that date pursuant to said Order dismissing Plaintiffs' Complaint.

ASSOCIATION OF DATA PROCESSING SERVICE
ORGANIZATIONS, INC. AND DATA SYSTEMS, INC.
By SHANEDLING, PHILLIPS, GROSS & AARON
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/s/ BERT M. GROSS

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(Filed in the United States District Court, District of Minnesota, Third Division, on 1-17-68.)

(Opinion)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19,218

Association of Data Processing Service Organizations, Inc., and Data Systems, Inc.,

Appellants,

vs.

William B. Camp, Comptroller of the Currency of the United States, and American National Bank and Trust Company,

Appellees.

Appeal from the United States District Court for the District of Minnesota.

[February 6, 1969.]

Before VOGEL, LAY and BRIGHT, Circuit Judges.

LAY, Circuit Judge.

Plaintiffs appeal from an order dismissing their complaint against the Comptroller of the Currency of the United States and the Minnesota domiciled American National Bank and Trust Company. One of the plaintiffs is Association of Data Processing Service Organizations, an incorporated association of data service organizations domiciled in Pennsylvania whose members perform data processing services throughout the United States. It is hereinafter referred to as ADAPSO. The other plaintiff, Data Systems, Inc., is a Minnesota cor-

poration engaged in the data processing business, with its principal place of business in Minneapolis. The complaint seeks equitable relief against the defendants and a "determination of the powers granted national banking associations under [the National Bank] Act as set forth in 12 U.S. Code §24." It is alleged that by administrative rule the Comptroller of the Currency has authorized national banks to perform data processing services for bank customers in violation of 12 U.S.C. §24 which gives national banks only "incidental powers as shall be necessary to carry on the business of banking." Plaintiffs allege that as a result of the unauthorized action ADAPSO members are threatened with the loss of a substantial part of the data processing market.[1] It is alleged that American National now performs data processing services for two companies with whom Data Systems had "negotiated" as prospective customers.

Jurisdiction is asserted by reason of an alleged federal question arising under the banking laws of the United States. 12 U.S.C. §§ 21 et seq. The trial court dismissed plaintiffs' complaint for lack of jurisdictional standing. We affirm.

The question of standing serves as a test of federal jurisdiction. Standing is the constitutional prerequisite related to whether a justiciable "case or controversy" exists. Involved is an examination to determine whether the plaintiffs have a personal stake legally sufficient "to assure that concrete adverseness" which avoids merely abstract determinations. *Flast v. Cohen,* 392 U.S. 83 (1968). See also *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227 (1937). Justiciability, although not always related to standing, becomes definitely attached when we consider whether the legal relation-

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[1]We need not decide whether ADAPSO as an association can properly allege "loss of competition" on behalf of its members when it is not engaged in the data processing business itself. See discussion, Jaffe, Judicial Control of Administrative Action 542-43 (1965).

ships of parties are such that they are aligned with adverse legal interests.

Plaintiffs assert standing in that they have been and will continue to be economically injured by *illegal* competition of the national banks. Whether a litigant has standing to challenge competitive injury has been the subject of extended litigation and discussion. Doctrinal rules have developed a maze of conceptualistic abstractions and theories which at times are viewed and applied as being indistinguishable one from another. See *Baker, Watts & Co. v. Saxon*, 261 F.Supp. 247 (D.D.C. 1966), aff'd sub nom., *Port of N. Y. Authority v. Baker, Watts & Co.*, 392 F.2d 497 (D.C. Cir. 1968); *Saxon v. Georgia Ass'n of Ind. Ins. Agents, Inc.*, 399 F.2d 1010, 1019 (5 Cir. 1968) (concurring opinion).[2]

The trial court here has observed that language in *Rural Elec. Admin. v. Northern States Power Co.*, 373 F.2d 686 (8 Cir. 1967) (denying standing)[3] and in *Webster Groves Trust Co. v. Saxon*, 370 F.2d 381 (8 Cir. 1966) (allowing standing)[4] seems to state divergent principles, either of which could govern in the instant case. However, all legal principles must be qualitatively analyzed within the context of factual surroundings. Much of the confusion on standing seems to arise from the emphasis upon the issues to be adjudicated or upon the possible merits of the substantive claim rather than upon an examination of the *status* of the

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[2]See also extended discussion in 3 Davis, Administrative Law 208-294 (1958); Jaffe, Judicial Control of Administrative Action 500-531 (1965). And more recently, Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601 (1968).

[3]We stated in *Northern States*, 373 F.2d 692:

"Appellees readily recognize that the interest of the economic competitor is not sufficient standing to challenge the authority or discretion of the Administrator to make loans."

[4]We stated in *Webster Groves*, 370 F.2d 388:

"[W]hen a competitor believes he is being subjected to illegal competition owing to impropriety by the Comptroller, the courts should be open to hear and decide the alleged wrong."

complaining plaintiff. Whether or not a defendant is alleged to be engaged in illegal competition cannot by itself determine a plaintiff's standing to complain. Cf. *Chicago v. Atchison, T. & S. F. Ry.*, 357 U.S. 77 (1958), and note 8 infra. Chief Justice Warren has stated, "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." However, he added, ". . . it is both appropriate and necessary to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Flast v. Cohen*, 392 U.S. 83, 99, 102 (1968).

Whether a party may or may not challenge allegedly illegal competition by others is best evaluated by examining the various factual circumstances within which the courts have discussed a particular plaintiff's standing and competitive injury.

Perhaps most well known are the so-called "power cases," where the threatened economic loss arises from government-created competition. In these situations the embryo of the competition by the defendant is generally found in congressional legislation. But even though the validity of such legislation is challenged, or an attack is made on the authority of a government agent to loan money, the courts uniformly have denied standing to competitors who otherwise possess no legal right to be free from competition.[5] This group of cases is represented by *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 137 (1939), which early emphasized:

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[5]In addition, even though the attack upon a government program to loan money is alleged to be illegal, this does not make the competition itself legally wrong. This is explained because "the borrower owes him [the plaintiff] *no obligation* to refrain from using the proceeds in any lawful way the borrower may choose." *Alabama Power Co. v. Ickes*, 302 U.S. 464, 480 (1938). (Emphasis ours.)

"The appellants invoke the doctrine that one threatened with direct and special injury by the act of an agent of the government which, but for statutory authority for its performance, would be a violation of his legal rights, may challenge the validity of the statute in a suit against the agent. The principle is without application unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."

See also *Rural Elec. Admin. v. Northern States Power Co.*, supra.

Secondly, in contrast to the "power" cases are situations where a plaintiff, possessing a public grant or contract to operate, seeks to prevent a competitor from entering into an area of regulated and *restricted* competition. Representative of these cases is *Frost v. Corporation Comm'n*, 278 U.S. 515 (1929). This court has applied the rationale of *Frost* to a suit by a state bank against the Comptroller to prevent illegal competition. *Webster Groves Trust Co. v. Saxon*, 370 F.2d 381 (8 Cir. 1966). As observed in *Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 323 F.2d 290 (D.C. Cir. 1963), rev'd on other grounds, 379 U.S. 411 (1965), involved is a property right arising out of a public charter which bestows a *legal* interest on a state bank to complain.[6]

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[6]The branch banking provisions of the National Bank Act make the establishment of branch banks subject to the law of the states. 12 U.S.C. §36. A primary purpose in doing so is to ensure competitive equality between state and national banks. *First Nat'l Bank v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966). It has accordingly been held that this provision gives state banks a sufficient legal interest to provide them with statutory standing to challenge the legality of branching by national banks. See *National Bank v. Wayne Oakland Bank*, 252 F.2d 537 (6 Cir. 1958), discussed in *Hoosier State Bank v. Saxon*, 248 F.Supp. 233 (N.D. Ind. 1965). The contrast between basing a state bank's standing on a "property right" arising out of its charter and standing by reason of its inclusion within the class intended to be protected by the National Bank Act is one without essential difference. Perhaps the most realistic approach is that the right indigenous to the charter is protected by the statute.

Closely related but significantly different are those cases involving areas of competition which because of public interest find need of public licensing as opposed to a public grant or contract.[7] Here plaintiff-competitors are considered to be without a private "legal right" to protest unauthorized competition but nevertheless find standing by specific legislation as "aggrieved persons" to act in the public interest. See, e.g., *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942). Cf. *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). In these cases *Congress* has patently recognized need for judicial review

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[7]The Court stated in *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 at 474 (1940):

> "In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads, in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures which are unnecessary if free competition is to be permitted.
>
> "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts. That such ability may be assured the Act contemplates inquiry by the Commission, *inter alia*, into an applicant's financial qualifications to operate the proposed station.
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> "But the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel."

even though the competitive business controlled is considered free and otherwise unrestricted.[8]

Fourth, there are situations where competitors are given standing to challenge competition which is allegedly in violation of a statute, where the statute itself is said to be enacted for the express protection of the class of competitor complaining. The most recent example of these cases is found in *Hardin v. Kentucky Util. Co.*, 390 U.S. 1 (1968).[9] Plain-

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[8]But cf. *Chicago v. Atchison, T. & S. F. Ry.*, 357 U.S. 77 (1958). The Supreme Court recognized standing of a municipal licensed public transportation system to intervene and attack the entry of one seeking to compete in an alleged violation of a city ordinance. The Court made clear that standing of the intervenor could not be viewed from examination of the merits as to whether in fact the competition was or was not illegal. Parmelee, the intervenor, for many years had enjoyed an arrangement with the railroad to transport passengers between stations. Parmelee was notified of its termination. A competitor, Railroad Transfer Service, was subsequently given this business notwithstanding a city ordinance that prohibited it from doing so without a license from the city. The Court found that Parmelee had "a direct and substantial personal interest in the outcome" and allowed standing. The ordinance was then held unconstitutional as being repugnant to the Interstate Commerce Act and the intervenor lost.

This case may best be categorized with those instances where standing to challenge illegal competition is implicitly found within a legislative enactment, be it an existing ordinance or statute, valid or not. Cf. *Alton R.R. v. United States*, 315 U.S. 15, 19 (1942).

[9]The Supreme Court said:

"This Court has, it is true, repeatedly held that the economic injury which results from lawful competition cannot, in and of itself, confer standing on the injured business to question the legality of any aspect of its competitor's operations. *Railroad Co. v. Ellerman*, 105 U.S. 166 (1882); *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938); *Tennessee Power Co. v. TVA*, 306 U.S. 118 (1939); *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940). But competitive injury provided no basis for standing in the above cases simply because the statutory and constitutional requirements that the plaintiff sought to enforce were in no way concerned with protecting against competitive injury. In contrast, it has been the rule, at least since the *Chicago Junction Case*, 264 U.S. 258 (1924), that when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision. See *Alton R. Co. v. United States*, 315 U.S. 15, 19 (1942); *Chicago v. Atchison, T. & S. F. R. Co.*, 357 U.S. 77, 83 (1958).

tiffs' reliance on recent cases against the Comptroller fall within facile classification of this rule. See, e.g., *Baker, Watts & Co. v. Saxon*, 261 F. Supp. 247, supra, as explained in *Investment Co. Institute v. Camp*, 274 F. Supp. 624, 636 (D.D.C. 1967); *Saxon v. Georgia Ass'n of Ind. Ins. Agents, Inc.*, 399 F.2d 1010 (5 Cir. 1968).[10]

Fifth, the last group of "competition" cases relates to a plaintiff's unsuccessful challenge of a competitor's alleged *ultra vires* acts affecting plaintiff's non-regulated area of commerce. This factual setting is best illustrated by *Railroad Co. v. Ellerman*, 105 U.S. 166 (1882). In that case the plaintiff, who had contracted with the city of New Orleans to collect revenue from users of the city wharves, sought to enjoin a railroad company from operating wharves in New Orleans. He alleged this action would constitute illegal competition because the state statute authorizing the company to operate wharves was unconstitutional. The principle here furnishes an analogue to that in the "power cases" where the conduct of the defendant, although alleged to be illegal is nevertheless considered "lawful" with respect to

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"Petitioners concede, as of course they must, that one of the primary purposes of the area limitations in §15d of the Act was to protect private utilities from TVA competition." *Hardin v. Kentucky Util. Co.*, 390 U.S. at 5-6.

[10]We do not share confidence in the alternative holding in *Saxon v. Georgia Ass'n of Ind. Ins. Agents, Inc.*, 399 F.2d 1010 (5 Cir. 1968), that outside the "statutory aid to standing" plaintiffs had "a legal right to protect themselves from unlawful competition." Id. at 1018. The emphasis that plaintiff's standing arises out of the allegation of "unlawful competition" as contrasted to "lawful competition" seemingly relates standing to the merits of the claim to be adjudicated rather than the status of a party to complain. For a similar critique, see Judge Thornberry's concurring opinion, 399 F.2d at 1020, n. 3.

the plaintiff because of the total absence of legal interest found in plaintiff's status.[11]

In summary, a plaintiff may challenge alleged illegal competition when as complainant it pursues (1) a legal interest by reason of public charter or contract, *Frost v. Corporation Comm'n*, supra, (2) a legal interest by reason of statutory protection, *Baker, Watts & Co. v. Saxon*, supra, or (3)

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[11]This is explained by Mr. Justice Matthews in *Railroad Co. v. Ellerman*, 105 U.S. at 173-174:

"The sole remaining question, then, is whether Ellerman, as assignee of the city, has any legal interest which entitled him to enjoin the company from using its wharf as a public wharf beyond the limits of such use, as defined by that construction of the joint resolution. If he has such interest, it can only consist in preventing competition with himself as a wharfinger, which such more extensive use of the railroad property would create. And if the right to assert it exists, it must rest, not upon the claim that the premises are thus used for purposes to which they might not be lawfully devoted if owned and used by a natural person, but on the allegation merely that such use is beyond the corporate powers of the company. But if the competition in itself, however injurious, is not a wrong of which he could complain against a natural person, being the riparian proprietor, how does it become so merely because the author of it is a corporation acting *ultra vires*? The damage is attributable to the competition, and to that alone. But the competition is not illegal. It is not unlawful for any one to compete with the company, although the latter may not be authorized to engage in the same business. *The legal interest which qualifies a complainant other than the State itself to sue in such a case is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty.* A stockholder of the company has such an interest in restraining it within the limits of the enterprise for which it was formed, because that is to enforce his contract of membership. The State has a legal interest in preventing the usurpation and perversion of its franchises, because it is a trustee of its powers for uses strictly public. In these questions the appellee has no interest, and he cannot raise them in order, under that cover, to create and protect a monopoly which the law does not give him. The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the railroad company damages him, the answer is, that it does not abridge or impair any such right. If he alleges that the railroad company is acting beyond the warrant of the law, the answer is, that a violation of its charter does not of itself injuriously affect any of his rights. The company is not shown to owe him any duty which it has not performed." (Emphasis ours.)

a "public interest" in which Congress has recognized the need for review of administrative action and plaintiff is significantly involved to have standing to represent the public, *FCC v. Sanders Bros. Radio Station*, supra. From this analysis, it seems clear that an allegation of "illegal competition" is not the balancing determinant of a plaintiff's standing. The primary search must rest on whether the plaintiff's status is one which enjoys a private interest entitled to protection or is one which the law recognizes to be of such legal significance to allow a party to act as a public representative for a public interest.

In the instant case the facts clearly place plaintiffs outside those cases which recognize standing. Plaintiffs are competing in a non-regulatory field of free competition. They possess no private legal interest nor do they plead any legal harm which is recognized at law. Their status is not one which places them within a class designedly protected by statute.[12] In direct accord see *Wingate Corp. v. Industrial Nat'l Bank*, 288 F. Supp. 49 (D.R.I. 1968); *Arnold Tours, Inc. v. Camp*, 286 F. Supp. 770 (D. Mass. 1968).

Plaintiffs' argument is in essence an equitable plea, that in effect they have a personal stake to pursue, even though not a legal one, but nevertheless one which makes them logical parties to protect the public interest from illegal actions of government agencies.

The problem with their plea is many-fold. Congress has not seen fit within the National Bank Act to recognize any

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[12]The Bank Act has never been construed to give a private litigant standing to complain concerning *ultra vires* acts of national banks relating to executed contracts. See *National Bank v. Matthews*, 98 U.S. 621 (1878). Although distinctive policy arguments exist for this rule, nevertheless there exists no legislative history nor do plaintiffs offer any serious contention that the National Bank Act was intended to give these private litigants standing to litigate alleged *ultra vires* activities of national banks. The reliance on the Bank Holding Company Act of 1966 and the Bank Service Corporation Act is misplaced. Neither act is applicable here.

"aggrieved person" to assert the public's rights. Congress has not expressed a public concern for protection as found in *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), and its progenitors. Without a legal interest or the status of a recognized "aggrieved" party, the complaint resolves itself into an attempt merely to show "a common concern for obedience to law." *L. Singer & Sons v. Union Pac. R.R.*, 311 U.S. 295, 304 (1940). As pronounced in *Singer*, outside statutory consent, the general or common interest can find protection only in the standing granted to public authorities. Unless a relevant statute provides for a "party in interest" to seek judicial review or unless a complainant possesses a recognized legal interest, he lacks standing to be a "private attorney general" to represent the public interest. See *Kansas City Power & Light Co. v. McKay*, 225 F.2d 924 (D.C. Cir. 1955); *Braude v. Wirtz*, 350 F.2d 702, 707, 708 (9 Cir. 1965).[13]

Mr. Justice Frankfurter best describes judicial obligation to avoid review when legal standing is not otherwise involved:

> "The jurisdiction of the federal courts can be invoked only under circumstances which to the expert feel of lawyers constitute a 'case or controversy.' The scope and consequences of the review with which the judiciary is entrusted over executive and legislative action require us to observe these bounds fastidiously." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 150 (1951) (concurring opinion).

Judgment affirmed.

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[13]See also our prior discussions concerning the applicability of the Administrative Procedure Act in *Rural Elec. Admin. v. Northern States Power Co.*, 373 F.2d at 692, n. 9.

(Judgment)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19218. September Term, 1969

Association of Data Processing Service Organizations, Inc., and Data Systems, Inc.,

Appellants,

vs.

William B. Camp, Comptroller of the Currency of the United States, and American National Bank and Trust Company,

Appellees.

Appeal from the United States District Court for the District of Minnesota

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This cause came on to be heard on the record from the United States District Court for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here Ordered and Adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

February 6, 1969.

Costs taxed in favor of appellee American Natl. Bank & Trust Co. for printing brief—$98.00.

Costs taxed in favor of appellee Wm. B. Camp, Comptroller, etc., for printing brief & suppl. brief & Appendix—$32.96.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1968

No. 1246

ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., and DATA SYSTEMS, INC.,
Petitioners,

vs.

WILLIAM B. CAMP, Comptroller of the Currency of the United States, and AMERICAN NATIONAL BANK AND TRUST COMPANY,
Respondents.

ORDER

The petition for a writ of certiorari is granted and the case is placed on the summary calendar.